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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LESLIE HARBOLD, Defendant and Appellant.	D040963 (Super. Ct. No. SCE217220)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Affirmed.

Robert Leslie Harbold was found guilty of murder in the second degree. It was found true that in the commission of that offense he discharged a firearm within the meaning of Penal Code[1] section 12022.53, subdivision (d), and used a firearm within the meaning of section 12022.5, subdivision (a)(1). Harbold was sentenced to a prison term of 40 years to life. He appeals, arguing there was insufficient evidence to support the

second degree murder conviction, the trial court erred in refusing to modify the jury instruction concerning voluntary manslaughter and the imposition of a 25 years-to-life term for discharging a firearm amounted to cruel or unusual punishment.

FACTS

A. *Prosecution Case*

Appellant and Stephanie Rosignolo were married from 1987 through 1994. The couple separated numerous times and eventually divorced in 1994 when Rosignolo discovered she was pregnant with another man's child. Rosignolo remarried; however, she divorced her new husband in November 1996 and moved back in with appellant several years later. Brett Dunnagan lived in the same apartment complex as appellant and Rosignolo. In January 2001, Rosignolo and Dunnagan became romantically involved.

The morning of November 10, 2001, appellant found Rosignolo and Dunnagan sleeping, fully clothed, on the couch in appellant's apartment. Appellant proceeded to hit Dunnagan several times in the face, knocking out one of his teeth. Dunnagan did not fight back. Rosignolo told appellant she was in love with Dunnagan and not with him. Appellant was affected by this comment since he was attempting to reconcile with Rosignolo. Appellant then told Rosignolo to leave, which she did. Appellant told Rosignolo that if he "caught" her going over to Dunnagan's again, he would kill Dunnagan. Later that day a neighbor, Michelle Riddlespurger, testified she saw

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1 All further statutory references are to the Penal Code unless otherwise indicated.

appellant, who was upset and crying, in the apartment parking lot breaking the windows of Dunnagan's truck. Appellant told Riddlespurger that if he saw Dunnagan with Rosignolo again he would kill him.

On November 11, 2001, Rosignolo and Dunnagan spent the night at Dunnagan's apartment. They were awakened the next morning when appellant began hitting and choking Dunnagan. Dunnagan tried to free himself by pulling at appellant's wrists. Rosignolo tried to help Dunnagan but appellant punched her in the eye. As the fight continued Rosignolo went into another bedroom and called 911. Appellant left the apartment. Dunnagan, gasping for air, joined Rosignolo in the bedroom. Rosignolo then saw appellant in the doorway with a shotgun. Rosignolo recognized the gun as one appellant kept in a closet in his apartment. The shotgun was a type that required it be pumped each time it was fired. Dunnagan or Rosignolo closed the bedroom door. Appellant fired through the door. When Dunnagan and Rosignolo went into the hallway outside the bedroom, appellant shot Dunnagan in the stomach. Dunnagan screamed and fell to his knees, appellant then shot him in the head. Rosignolo heard appellant go downstairs and say "oh, my God."

Around 7:30 a.m. that same morning, Riddlespurger was awakened. She observed appellant sitting in the front room of Dunnagan's apartment, holding a gun and looking like he was in a state of shock. Riddlespurger heard Rosignolo screaming from inside the apartment and called 911.

Deputy Sheriff Eric Drogemuller responded to the scene. He saw appellant come outside of Dunnagan's apartment and surrender to other deputies. Appellant was holding

a shotgun and appeared to be calm. When asked if there were any victims or any other suspects, appellant responded in a calm voice "his ex-wife and her boyfriend, the dead guy."

B. *Defense Case*

Appellant testified on his own behalf. Appellant stated he heard rumors about Rosignolo having an affair with Dunnagan. Appellant believed Rosignolo had a drug problem and Dunnagan was supplying her with drugs. Appellant acknowledged confronting Dunnagan on November 10, 2001, when he discovered Rosignolo with him on the couch in appellant's apartment. Appellant also acknowledged damaging Dunnagan's vehicle with a baseball bat and threatening to shoot him.

On the morning of November 12, 2001, appellant was preparing to take his children hiking when he saw Dunnagan's truck parked outside. Appellant believed that Rosignolo was in Dunnagan's apartment. Appellant testified he entered Dunnagan's apartment through the back door and attacked Dunnagan in his bedroom because he was angry and embarrassed.

After attacking Dunnagan, appellant went to his apartment and retrieved his shotgun. As appellant left his apartment, he loaded the gun. He returned to Dunnagan's apartment after about 20 seconds and shot the door to the room where Rosignolo and Dunnagan were waiting. Appellant testified he did not intend to shoot Dunnagan when he returned to the apartment with the shotgun but that he only wanted to scare Dunnagan and Rosignolo into leaving. Appellant testified that Dunnagan rushed forward and there was a struggle over the gun. Appellant testified he feared for his life. Appellant pulled

the trigger but was not aware that he had hit Dunnagan with this shot. Because appellant thought Dunnagan was still reaching for the gun, appellant then pulled the trigger again and shot Dunnagan in the head.

DISCUSSION

A. *Sufficiency of Evidence*

Appellant argues the evidence was insufficient to convict him of second degree murder. Specifically, he contends the evidence was so clear that he shot Dunnagan without malice aforethought and as the result of heat of passion that the jury could not reasonably convict him of murder.

Appellant argues he endured a long period of provocation as a result of rumors concerning Rosignolo and Dunnagan's affair. Two days before the killing he found the two sleeping together in his apartment. Shortly before the killing he found the two in Dunnagan's apartment sleeping together again. He acknowledges he left Dunnagan's apartment, went to his own, got his shotgun, loaded it, returned to Dunnagan's apartment, fired a shot through a door to gain entry and then shot Dunnagan twice. He contends the provocation was extreme, the time was too short between leaving and returning to Dunnagan's apartment to cool off and that as a matter of law he was guilty only of voluntary manslaughter.

In testing the sufficiency of evidence we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible and of solid value—and logical inferences that could be drawn from that evidence such that a reasonable trier of fact could find the

defendant guilty beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

The evidence in this case would reasonably support a finding of first or second degree murder or voluntary manslaughter. There was evidence appellant intended to kill Dunnagan. He expressly stated he would do so if he caught Rosignolo at Dunnagun's apartment. While the time between the confrontation in Dunnagan's apartment and appellant departing, returning with a gun and killing him was not great, it was certainly long enough to support a finding of premeditation and deliberation. Moreover, while appellant might have been provoked, it was not unreasonable for the jury to find it did not rise to a level sufficient to support a finding of voluntary manslaughter. It was also not unreasonable for the jury to find there was a sufficient cooling off period and that appellant should not have returned to Dunnagan's apartment with his gun.[2]

B. *Modification of CALJIC No. 8.42*

Appellant argues the trial court erred in refusing to modify CALJIC No. 8.42 [Sudden Quarrel or Heat of Passion and Provocation Explained] to explain that it is the defendant's state of mind and not the conduct of the victim that determines whether a particular defense or mitigation might exist.

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2 We note that while trial counsel's argument to the jury suggested a number of defenses, as we read appellant's testimony his claim was that he acted in self-defense or imperfect self-defense or that he fired accidentally. As appellant related events, he may well have gone to Dunnagan's apartment, fought with him, left and returned with his shotgun in a jealous rage, but he shot Dunnagan accidentally or to defend himself.

As given in this case, CALJIC No. 8.42 tells the jury in relevant part: "To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion. [¶] The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. [¶] A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. . . . . [¶] The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from passion rather than judgment."

During the instructions conference, defense counsel, without lengthy explanation, asked the court to modify CALJIC No. 8.42 by adding that it is "the defendant's state of mind not the conduct of the victim that determines whether a particular defense or mitigation my be applicable." The prosecution asked the instruction be given without modification. The trial court concluded CALJIC No. 8.42 properly stated the law and declined the requested modification.

In support of his position that the trial court erred in refusing his requested modification, appellant cites *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083; *People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1069; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1204-1205. Each of those cases deals with the proposition that while a defendant's conduct is evaluated on an objective basis, i.e., would a reasonable person have been provoked to homicide by events, reasonableness is determined from the point of view of a reasonable person in the defendant's position. It appears appellant wanted the jury to understand that its proper focus was not on the actions of the victims but rather on appellant's reaction under all the circumstances to the situation in which he found himself.

CALJIC No. 8.42 as written makes that point. While the instruction repeatedly mentions that the test is the state of mind of an ordinary reasonable person, it also repeatedly states that this is judged based on all the circumstances under which the defendant acts. Inclusion of appellant's requested addition would have added nothing to the instruction and risked confusing the jury. It was properly rejected.

C. *Cruel and Unusual Punishment*

Appellant was sentenced to prison for a term for a term of 15 years to life for his conviction of second degree murder and to a consecutive term of 25 years to life as the result of a true finding on a section 12022.53, subdivision (d), allegation. That section requires an additional and consecutive term of 25 year to life be imposed when during the commission of certain stated offenses the defendant personally and intentionally discharged a firearm that proximately caused death or great bodily injury. Appellant

argues imposition of a 25 years-to-life term based on that finding amounts to cruel or unusual punishment.

1. Law

It is the job of the Legislature to define crimes and prescribe punishment. In general we defer to the Legislature's judgment in such matters and it is in only in the rarest of cases that we declare mandated sentences unconstitutionally excessive. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1213-1214.) Still, the issue of whether a sentence exceeds constitutional limits is ultimately one for the courts. (*People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

In making that inquiry we consider both the nature of the offense and of the offender. The nature of the offense is viewed in the abstract and in the totality of circumstances surrounding its actual commission. In considering it in the abstract, courts compare the punishment in question to the punishment for other more serious offenses in California and to the punishment for the same offense in other jurisdictions. In considering the particular offender, we focus on the person before the court and ask whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as age, prior criminality, personal characteristics and state of mind. (*People v. Zepeda, supra,* 87 Cal.App.4th at p. 1214; *People v. Martinez* (1999) 76 Cal.App.4th 489, 493-494.)

2. Discussion

Appellant concedes that cases have determined section 12022.53, subdivision (d), does not in the abstract impose an unconstitutionally excessive sentence. (See *People v.*

Zepeda, supra, 87 Cal.App.4th at pp. 1214-1216; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-18; *People v. Martinez, supra,* 76 Cal.App.4th at pp. 493-494.) Appellant instead argues that given his lack of a criminal record and the great provocation under which he acted, the imposition of an additional term of 25 years to life in prison for discharging a shotgun at point blank range into the stomach and then head of an unarmed man in the victim's own home was cruel or unusual punishment.

We conclude this is not one of those very rare cases in which the culpability of the defendant is so minor when compared with the severity of the sentence that the Constitution is offended. The fact that appellant had no prior criminal record is not determinative. (*People v. Martinez, supra,* 76 Cal.App.4th at p. 497.) At the time of the crime appellant was 35 years of age. There is no indication he suffered from any psychological disorder or that at the time of the crime he was under the influence of alcohol or drugs.

There is no doubt appellant was acting under provoking circumstances. Still, this was not a case in which he suddenly discovered his ex-wife was having an affair and acted immediately. The final confrontation between appellant and his victim was building for days. Appellant took no action to avoid further provocation or to lessen the pressure he was feeling. Instead, on the morning of the shooting, appellant went to his victim's apartment and without invitation or notice entered. He physically attacked his victim. He then went back to his apartment, loaded his shotgun, returned to his victim's home and shot him twice at close range. There was insufficient provocation to render the

imposition of a 25 years-to-life sentence for the discharge of a firearm in this case constitutionally infirm.

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.